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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 783

CASSIUS MARSELLUS CLAY a/k/a MUHAMMAD ALI,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the court of appeals (191a–233a) is reported at 397 F. 2d 901. The opinion of the court of appeals (236a–250a) on remand from this Court (*sub nom. Giordano* v. *United States,* 394 U.S. 310) is reported at 430 F. 2d 165. The opinion of the district court (R.P. Vol. I, 50–59)[1] on remand is unreported.

[1] "R.P." references are to the three-volume, printed record of proceedings in the district court on remand, which is a part of the record before this Court. "SSF" references are to petitioner's Selective Service file, also part of the record before this Court.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1970, and a petition for rehearing was denied on August 19, 1970. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to October 3, 1970, and, on October 1, 1970, the petition was filed. It was granted, limited to a single question, on January 11, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The grant of certiorari was limited by the Court to this question:

> Whether petitioner's conviction should be vacated in light of this Court's decision in *Welsh* v. *United States*, 398 U.S. 333 (1970), because the denial to petitioner of a conscientious objector exemption may have been based upon the Department of Justice's erroneous characterization of his objections to participation in wars as "political and racial" rather than "religious"?

STATUTE INVOLVED

50 U.S.C. App. (Supp. V) 456(j),[2] provides in pertinent part:

> Nothing contained in this title * * * shall be construed to require any person to be subject

[2] At the time petitioner's claim was processed by the Selective Service System, Section 6(j) defined the phrase "religious training and belief" to mean "an individual's belief in a relation to a Supreme Being * * *" (50 U.S.C. App. 456(j)). This reference to "Supreme Being" has since been dropped from the

to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

* * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of knowingly and wilfully refusing to submit to induction into the armed forces, in violation of 50 U.S.C. App. 462(a). On June 20, 1967, he was sentenced to five years' imprisonment and a $10,000 fine.[2]

Petitioner, at the age of eighteen, registered with his local Selective Service board in Louisville, Kentucky on April 18, 1960; on March 9, 1962, he was classified I–A (App. 3a). Two years later, on March 26, 1964, having failed to pass a physical and mental examination under the standards then in effect (SSF 538, 539; App. 3a), he was placed in Class I–Y, a classification assigned to those not currently qualified for military service who could be qualified in time of war or national emergency. 32 C.F.R. 1622.17. Petitioner

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statute; however, the change has no relevance to the instant case. See *United States* v. *Seeger*, 380 U.S. 163.

[2] At the time of sentencing the district judge remarked (App. 196a): "Well, I am going to impose the maximum penalty because under the rules at the end of an appeal if it is reversed, why, of course it is nil. If it is affirmed it is then subject to motion to reduce, and I find that we get into problems when clemency is given at the time of sentencing and then following an affirmance there is another petition for clemency."

held this classification until February 1966, when he became eligible for military service under newly promulgated and revised regulations, changing the minimum qualifying standards for I–Y status. On February 3, 1966, his local board mailed him a statement (DD form 62) that he was now physically acceptable for service (App. 3a).

Petitioner then wrote to his local board, on February 14, 1966,[4] advising for the first time that (App. 10a):

> * * * I am a devoit [*sic*] Muslim and a follower of the Islamic religious faith under the discipline of the Prophet 'Elijah [*sic*] Muhammad. To bear arms or kill is against my religion and I conscientiously object to any combat military service that involves the participation in any war in which the lives of human beings is taken. This I do not believe to be rightous [*sic*]. This has been my faith upward of 5 years. years.

The board mailed to him SS Form 150 (Special Form for Conscientious Objectors) on February 18, 1966, the same day it mailed to him the notice that he had been reclassified I–A; on February 28, 1966, the completed form was returned (App. 12a). In the

[4] In this letter to the board, petitioner also advised that he was then the Heavyweight Boxing Champion of the World; that he was divorced and accountable for alimony in the sum of $1250.00 per month and liable for two lump-sum payments of $50,000; that he had not previously been given a complete physical examination; that his mother was a dependent and he was her sole source of support; that he suffered from a hernia; and that he had been arrested for disorderly conduct in Chicago for which trial was pending (App. 9a–11a).

form, petitioner indicated that he believed in a Supreme Being. He described the nature of his belief as follows: "Muslim—meaning peace—total submission to will of Allah—Do not take lives of anyone; nor war when not ordered by Allah (God)—Keep up prayer and pay poor rates" (App. 13a). The use of force, he stated, is permissible "[o]nly in sports and self defense" (App. 14a). And, in explaining the basic tenets of his religion, petitioner said (App. 15a): "Islam teaches Peace—Allah (God) forbids wars, except when Islam is attacked."

Petitioner requested a personal appearance before the local board in connection with the change in his classification from I–Y to I–A (App. 17a). The request was granted and on March 17, 1966, he appeared before four members of the board. The official minutes of that meeting (App. 17a–18a) reflect that, after discussion of petitioner's claims to physical (I–Y) and hardship (III–A) deferments, petitioner stated that he was no longer Cassius Clay since that was a slave name; he had taken the name of Muhammad Ali. He advised the board (App. 18a) that "[h]is religion teaches * * * not to take part in any way with infidels or any non-religious group" and to "fight only in self defense, not war * * *." He also stated (*ibid.*) that the Muslims have "their own police force and no muslim may carry any lethal weapon. Mohammid [*sic*] is their leader." The board minutes further indicate that he expressed as one of the bases for his objection to military service that "he has no quarrel with the Viet Cong." And he

"stated that he could not, without being a hypocrit [*sic*], take part in anything such as war or anything that is against the Moslim [*sic*] religion." After the appearance, the board voted unanimously to retain petitioner in Class I–A.

Petitioner then appealed to the Kentucky State Appeal Board (App. 4a). In addition to claiming that he had been improperly denied I–Y and III–A classifications, petitioner stated in his letter asserting his desire to appeal that his "religious beliefs decree that I not serve in any military purpose to promote war. I reaffirm my stand thereon as my prior duty to Allah (God) the Supreme being over all" (App. 21a). The appeal board reviewed petitioner's file *de novo* and, on May 6, 1966, tentatively determined that he was not entitled I–O (conscientious objector) status or any lower classification (App. 4a–5a). In accordance with the procedures in effect at that time (50 U.S.C. App. 456(j); 32 C.F.R. (1967 ed.) 1626.25) the matter was referred to the Department of Justice for an advisory recommendation.[5]

On August 23, 1966, petitioner appeared before the Department of Justice hearing officer, accompanied by counsel, his mother and father, an Assistant Minister of the Muslim religion, and his tax attorney. He offered into evidence a book entitled *Message to the Black Man in America,* by Elijah Muhammad, a book entitled *Holy Qur'an* (English Translation) (App. 40a–

[5] The procedure for securing this advisory recommendation of the Department was eliminated by the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. IV) 456(j).

41a), and a newspaper entitled "Muhammad Speaks" (App. 33a). *Message to the Black Man in America* and *Holy Qur'an* were described as the books which were followed as a basis for the beliefs held by the Nation of Islam and as the basis for the objections that the petitioner expressed in his papers filed with the draft board (App. 40a). Petitioner also said that he relied upon the newspaper "Muhammad Speaks" in formulating his views (App. 161a).[6]

At the hearing, petitioner admitted making the following statement which had been attributed to him in a newspaper article (App. 79a–80a):

> Let me tell you what Muslims are taught; to defend ourselves when we are attacked. * * *
>
> Those Viet Cong are not attacking me. These Viet Cong are fighting a very nasty war over there. There's a lot of people getting killed. Why should we Muslims get involved. Besides, I'm fighting for the Government every day. I'm laying my life on the line for the Government. Nine out of ten soldiers would not want to be in my place in the ring. It's too dangerous.[7]

When inquiry was made as to whether he would accept noncombatant service, he responded (App. 96a–97a):

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[6] The portion of "Muhammad Speaks" upon which the Department of Justice relied in its recommendation appears in substantially the same form in *Message to the Black Man in America*, page 164. All these materials, as well as the transcript of the hearing, were forwarded by the Department of Justice to the appeal board (App. 114a).

[7] Petitioner explained that everything in the statement was true and that Elijah Muhammad condemned him officially "for making such a wild, boastful statement * * *" (App. 80a).

> * * * the Holy Qur'an and the teachings of the Honorable Elijah Muhammad tells us * * * that we are not to participate in wars on the side of nobody who—on the side of non-believers, and this is a Christian country and this is not a Muslim country and the Government and the history and the facts shows [*sic*] that every move toward the Honorable Elijah Muhammad is made to distort and is made to ridicule him and is made to condemn him and the Government has admitted that the police of Los Angeles were wrong about attacking and killing our brothers and sisters and they were wrong in Newark, New Jersey, and they were wrong in Louisiana, and the outright, every day oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy Qur'an to even as much as aid in passing a cup of water to the—even a wounded.[8]

Petitioner also said that while he was sure that Elijah Muhammad would never so direct him, if Elijah Muhammad did advise him "to fight in any kind of war" (App. 101a), he would.

Samuel X. Saxon, an Assistant Minister and Captain of Muhammad's Mosque No. 29 in Miami, Florida, appeared on behalf of petitioner (App. 31a);

[8] At another time in the hearing, petitioner explained that the *Holy Qur'an* taught that he should not take part in war "unless declared by Allah himself, or unless it's an Islamic World War, or a Holy War * * * and * * * we are not to even as much as aid the infidels or the non-believers in Islam, even to as much as handing them a cup of water during battle" (App. 68a).

petitioner endorsed Saxon as being knowledgeable on the Muslim religion (App. 100a–102a). Saxon stated that he was familiar with the teachings of Elijah Muhammad and the Nation of Islam with respect to the performance of military service (App. 32a). He explained that the Muslims, "being righteous people, and trying to do the divine will of Almighty God," are taught and believe that they "shouldn't take part in wars or participate in them" (App. 32a–33a). Although the Fruit of Islam, a group within the Nation of Islam composed of male members (App. 37a), is taught "to prepare for the War of Armageddon" (App. 38a), Saxon declared that the Nation of Islam would not fight in this war; it would be fought between God and the devil. He added, however, that, to prepare spiritually for this War, the Fruit of Islam was given "military training, drill, judo, because we do protect our property and officials of—ministers—we protect our ministers; we protect the Honorable Elijah Muhammad" (App. 38a). There are no weapons of warfare, he said, but the group does believe in self-defense (App. 38a, 42a). And it is governed by a military system wherein the members are controlled by general orders similar to those issued by regular military organizations (*ibid.*).

When asked about a statement that "an Islamic state may ally itself with one or more states to defend a victim" and that warfare was "admissible and a virtue when undertaken to repel aggression," Saxon disavowed this as a principle of the Nation of Islam in the United States (App. 39a–40a). He

expressed the view that "we don't have no state to defend; that's why it have to be rejected" (App. 42a). But, he went on to state that the Muslims "believe that if we are attacked, or fight is forced on us, then we will defend ourselves because we believe we have no life after death so we must protect and defend ourselves so we can keep on living" (*ibid.*). That, however, would not, in the Muslims' view, be "war"; for, as he explained it, "war is when you [*sic*] voluntarily fighting someone * * *" (*ibid.*).

The hearing officer concluded that petitioner was sincere in his conscientious objection (App. 112a–118a). The Department of Justice Conscientious Objector Section reviewed the evidence and, on November 25, 1966, recommended to the Kentucky Appeal Board that petitioner's request for I–O status be denied (App. 127a). On January 10, 1967, petitioner was notified that he was to be retained in Class I–A (App. 5a).

On the same day that he appeared before the Justice Department hearing officer, August 23, 1966, petitioner filed with the Selective Service System a letter in which he claimed, for the first time, that he was entitled to a ministerial (IV–D) exemption because he was a minister of the Nation of Islam (App. 160a). On January 12, 1967, after reviewing petitioner's file, the local board denied this claim and declined to reopen his classification (App. 5a). Shortly thereafter, the National Director of Selective Service requested the local board to reopen petitioner's classification, and, on January 19, 1967, the board did so and again

classified petitioner I–A (App. 5a). Petitioner appealed and asked that the Appeal Board for the Southern District of Texas, where he then resided, hear the appeal. This request was granted and on February 15, 1967, the Texas Appeal Board, after considering petitioner's entire Selective Service file *de novo,* classified him I–A. On February 24, 1967, the National Director instituted an appeal to the National Selective Service Board (the Presidential Appeal Board) (App. 7a, 195a),[9] and on March 6, 1967, the Presidential Appeal Board voted to classify petitioner I–A (App. 7a).

On March 14, 1967, petitioner was ordered to report for induction at Louisville, Kentucky, on April 11, 1967 (App. 7a). He requested and obtained a transfer of his induction to Houston, Texas (App. 8a), and the reporting date was postponed to April 28, 1967. On that date, petitioner reported but refused to submit to induction (App. 8a). His indictment, trial and conviction followed.

On appeal, the Fifth Circuit initially held, insofar as is here relevant, that, under the applicable "basis in fact" review standard, "there was more than adequate evidence to justify the rejection" of petitioner's conscientious objector claim (App. 226a–227a). After remand by this Court on another issue (*sub nom. Giordano* v. *United States,* 394 U.S. 310), the case again reached the court of appeals; the court below reconsidered petitioner's claim in light of the

[9] Petitioner could not take such an appeal under the pertinent regulations, since the state appeal board's decision had been unanimous (see 32 C.F.R. 1627.1, 1627.3).

intervening decision in *Welsh* v. *United States*, 398 U.S. 333, and concluded (App. 249a, n. 9):

> [The Act] grants an exemption from service in the Armed Forces to a registrant "who, by reason of religious training and belief, is conscientiously opposed to participation in *war in any form.*" As we pointed out in our original opinion in this case, the Department of Justice recommendation * * * stated that Clay's beliefs insofar as they are based upon the teachings of the Nation of Islam "rest on grounds which are primarily political and racial." This constitutes objections *to only certain types of wars in certain circumstances, rather than a general scruple against participation in war in any form.*" [Emphasis in original.]

SUMMARY OF ARGUMENT

I

The sole issue presented to the Court in this case is whether the administrative denial of petitioner's conscientious objector claim was without any basis in fact. There is no dispute that petitioner's professed beliefs were founded on basic tenets of the Muslim religion, as he understood them, and derived in substantial part from his devotion to Allah as the Supreme Being. Thus, under this Court's decision in *United States* v. *Seeger*, 380 U.S. 163, his claim unquestionably was within the "religious training and belief" clause of the exemption provision. It clearly did not become more, or less, "religious" by virtue of anything this Court later said in *Welsh* v. *United States*, 398 U.S. 333.

II

Within this framework, there was ample basis to deny petitioner's claim on the ground that he failed to demonstrate a conscientious objection to "participation in war in any form." 50 U.S.C. App. (Supp. V) 456(j). Petitioner undeniably was opposed to participating in wars on behalf of the United States, and there are some statements in this record that might suggest opposition to all wars. But many statements by petitioner, and by the religious leaders on whom he placed total reliance, tended to show merely selective opposition. Thus, petitioner himself stated that he is "not to participate in wars on the side of nobody who—on the side of nonbelievers, * * * this is a Christian country and this is not a Muslim country * * *" (App. 96a–97a); that the Muslims don't go to war "unless declared by Allah himself, or unless it's an Islamic World War, or a Holy War" (App. 68a); that the Muslims "are taught to defend themselves when we are attacked" (App. 79a–80a); and that "[t]hose Viet Cong are not attacking me. * * * Why should we Muslims get involved" (App. 80a).

When compounded with other statements in the record, these statements raised a question, for administrative determination, whether petitioner did or did not object to all wars. There was ample evidence tending to show that petitioner would not object to fighting with real weapons in a defensive war on

behalf of Muslims. It was, therefore, not unreasonable for the Selective Service System to conclude that his was not a general scruple against participation in war, but rather a refusal to fight in wars on the side of white persons. Such a belief is consonant with the creed of his Muslim sect as expressed in the tracts that petitioner placed in the record as the sources of his beliefs.

Of course, "it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies." *Witmer* v. *United States*, 348 U.S. 375, 380–381. The scope of review is limited to a determination whether there exists a basis in fact for the assigned classification discoverable from the administrative record. Even if various statements in the instant record suggest an ambiguity as to the circumstances under which petitioner would be willing to engage in war, that ambiguity cannot accrue to his benefit. As this Court has recognized, it is "* * * the policy of Congress * * * to make review within the Selective Service System final in all cases where there was conflicting evidence or where two inferences could be drawn from the same testimony." *Witmer* v. *United States*, 348 U.S. 375, 383. The burden was on the petitioner to demonstrate that he is entitled to conscientious objector status, and on this record the administrative agency could fairly determine that he failed to meet that burden.

ARGUMENT

I. THE BASIS ON WHICH PETITIONER'S CONSCIENTIOUS OBJECTOR CLAIM WAS DENIED IS UNAFFECTED BY THE DECISION IN WELSH *v.* UNITED STATES, SINCE HIS CLAIM WAS ACKNOWLEDGED TO HAVE RELIGIOUS ROOTS

A. Last Term, this Court considered, in *Welsh* v. *United States,* 398 U.S. 333, whether a registrant, claiming a conscientious objection to all forms of war solely on the basis of deep and abiding moral and ethical convictions, is entitled to a statutory exemption from "combatant training and service" (50 U.S.C. App. (Supp. V) 456(j)), notwithstanding that his objection does not derive from any religion or religious training in the traditional sense. Mr. Justice Black, speaking for a plurality of the Court and viewing the issue as fundamentally indistinguishable from the question presented to this Court five years earlier in *United States* v. *Seeger,* 380 U.S. 163, answered in the affirmative.

Questions can, of course, be raised about the extent to which the *Welsh* decision expanded the *Seeger* definition of "religious training and belief," as that phrase is used in the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456(j)). We do not believe, however, that any such question is presented in the instant case. Here, it is undisputed that petitioner's professed beliefs, whatever their scope, are founded on basic tenets of the Muslim religion, as he understands them, and derive in substantial part from his acceptance of Allah as the Supreme Being (App. 13a). Thus, his claim to con-

scientious objector status, though in our view deficient in other respects (see *infra*, pp. 22–32), has roots no less "religious" than those of the three claims considered by this Court in *Seeger*.[10] It is not one which depends on *Welsh* to come within the statutory phrase "religious training and belief."

If, therefore, as petitioner now contends, the Department of Justice's advisory recommendation to his appeal board suggested that "his claim [to conscientious objector status] should be denied because it was not 'religious'" (Pet. Br. 16–17), he would have a claim not only under *Welsh* but equally under this Court's earlier ruling in *Seeger*, decided some months before petitioner filed his conscientious objector claim with his local board.[11] Indeed, petitioner made a

[10] The *Seeger* case was consolidated with *United States* v. *Jakobson* and *Peter* v. *United States*, since all three raised the question whether, under the then applicable statutory language (50 U.S.C. App. (Supp. III) 456(j)), the legislative reference to "Supreme Being" contemplated only the orthodox God. This Court decided it did not. Both Jakobson and Peter, like petitioner in the instant case, asserted that their opposition to war was based on a "Supreme Being" in their own scheme of things, though their "Supreme Being" was not the orthodox God. As for Seeger, this Court declared "that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional diety holds in the lives of his friends, the Quakers." 380 U.S. at 187. And Jakobson's devotion to a mystical force of 'Godness'" was equated with "Seeger's compulsion to 'goodness'." 380 U.S. at 186. Manifestly, no less can or should be made of petitioner's devotion to Allah; nor has the government ever suggested otherwise.

[11] There is, therefore, no need to discuss the complex question of the retrospective application of *Welsh*. That issue would be present in this case only if petitioner had asserted a *Welsh*-type claim and the Department of Justice had recommended that it be denied as "non-religious."

Seeger claim in the original proceedings below and the issue was fully litigated at that time. And, when the case was here earlier on petition for certiorari (*Clay a/k/a Muhammed Ali* v. *United States,* No. 271, O.T. 1968), petitioner presented to this Court the same issue that he now urges was only recently raised by *Welsh.* In almost identical language, he at that time argued that "[d]espite this recognition of the Muslim religion by the courts * * * the Department, in effect, ruled that beliefs of the Muslims were primarily political and racial, rather than religious" (Pet., No. 271, O.T. 1968, p. 16). In the circumstances of this case, nothing that the Court later said in *Welsh* would add to the consideration of such a claim.

There is, however, no dispute that petitioner's views on war had religious roots. Rather, the case which in our view controls the outcome of this litigation is *Gillette* v. *United States,* No. 85, this Term, decided March 8, 1971. For, the entire focus of the Department's advisory recommendation was on the scope and nature of petitioner's beliefs concerning war and not on whether those beliefs were based upon "religious" belief.

B. The true import of the Department's advisory recommendation becomes apparent when the fragmented portions quoted by petitioner (Pet. Br. 16–18) are read in the context of the recommendation as a whole. Thus, in discussing the book, *Message to the Black Man in America* and the newspaper, "Muhammad Speaks" (*supra,* pp. 6–7), both of which were submitted to the Justice Department hearing officer by counsel for petitioner as the basis for petitioner's objections con-

cerning war (App. 40a), the Department stated that the two documents (App. 120a–121a):

> * * * express essentially the view of the Black Muslims that the white man is their enemy, and that the black man should disassociate himself from the United States Government and its institutions and secure an independent nation for the black man within the United States.

On the basis of this literature, another book submitted by petitioner entitled *Holy Qur'an* (App. 40a), and various statements by the Honorable Elijah Muhammad, the recognized leader of the Black Muslims, the recommendation advised (App. 121a):

> It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad.

The Department then analyzed as well the statements by petitioner to the Department hearing officer and concluded that (App. 122a–123a):

> * * * registrant's claimed objections to participation in war insofar as they are based upon the teachings of the Nation of Islam, rest on grounds which primarily are political and racial. *These constitute only objections to certain types of war in certain circumstances, rather than a general scruple against participation in war in any form.* However, only a general scruple against participation in war in

any form can support an exemption as a conscientious objector under the Act. *United States* v. *Kauten*, 133 F. 2d 703. [Emphasis added.]

A "selective" objection to participation in particular wars, though not to "war in any form," is necessarily grounded on political or secular considerations whether or not it has a religious foundation. As this Court recently pointed out in *Gillette* v. *United States*, *supra*, slip op. 22, such partial opposition "does depend *inter alia* upon particularistic factual beliefs and policy assessments * * *." The "selective" objector does not lack religious motivation or religious basis for his views. In *Negre* v. *Larsen*, No. 325, this Term, decided with *Gillette*, the registrant's opposition solely to the conflict in Vietnam stemmed from his belief in the Catholic doctrine that all wars of aggression are "unjust," that it is only the "just" war—or defensive war—in which a Catholic may in good conscience participate.[12] Yet, this Court ruled that his claim does not come "within the purview of the exempting section, even though [his] objection may have such roots in [his] conscience and personality that it is 'religious' in character." *Gillette* v. *United States*, *supra*, slip op. 10.

This was precisely the point being made by the Department of Justice in the instant case in the earlier quoted portions of its advisory recommendation. Petitioner's conscientious objection, like Negre's,

[12] See our brief in *Gillette* v. *United States* and *Negre* v. *Larsen*, Nos. 85, and 325, this Term, pp. 5–10.

was found to be motivated by the teachings of his religion: personal participation by Muslims in a war of aggression is forbidden; participation in a defensive war is encouraged (see *infra*, pp. 25–27). Conceptually, then, petitioner's beliefs derived from the same fundamental religious distinction between "just" and "unjust" wars. The only difference lay in the manner in which he, as a Muslim, and Negre, as a Catholic, would define a "defensive" war; that necessarily turns on considerations which are by nature "political." It is in this light that the petitioner's objection was characterized as essentially "political," just as the Army had found that Negre's claim was "based upon a personal moral code" (see our brief in *Gillette* and *Negre*, Nos. 85 and 325, this Term, p. 9). In neither case was the "religious" nature of the beliefs being drawn into question; rather the focus was on their selective aspect.

The Department's reliance on *United States* v. *Kauten*, 133 F. 2d 703 (C.A. 2), in its recommendation as to petitioner substantiates this interpretation. That case involved a claim to conscientious objector status by an artist whose opposition was to a particular war on the basis of philosophical and political considerations. While the court there held, as petitioner indicates (Pet. Br. 17), that the claim failed to qualify for exemption under the "religious training and belief" clause of the statute, it then stated (133 F. 2d at 708) that "the provisions of the present statute [the

Selective Training and Service Act of 1940, 54 Stat. 885] are more generous for they take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption. * * *" Noting that Kauten's objection was only "applicable to this war [World War II]," the court ruled that a belief sufficient to qualify for exemption "must *ex vi termini* be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war" (133 F. 2d at 707). The context in which *Kauten* was used in the Department's advisory recommendation (App. 123a) indicates that it was this aspect of the decision that prompted its citation in support of the proposition that only a total opposition to war qualifies for the statutory exemption.[13]

This Court's recent decision in *Gillette* v. *United States, supra,* has disposed of the constitutional and statutory objections to denial of conscientious objector status to those whose opposition is limited to particular wars. Consequently, it remains only to determine whether on the record in this case the courts below correctly found a basis in fact for the administrative determination that petitioner's views did not have the requisite breadth.

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[13] See also the similar reference to *Kauten* in the Department's recommendation at App. 124a.

II. THERE IS ADEQUATE BASIS IN FACT FOR THE ADMINISTRATIVE DETERMINATION THAT PETITIONER DID NOT QUALIFY AS A CONSCIENTIOUS OBJECTOR BECAUSE HIS OBJECTION TO WAR WAS SELECTIVE AND NOT GENERAL.

A. Unlike most other claims to draft exemption or deferment, the disposition of which turns on objective facts, "the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form." *Witmer* v. *United States,* 348 U.S. 375, 381. That is a question which Congress has chosen to commit, in the first instance, to the discretion and expertise of the Selective Service System. See *Thompson* v. *United States,* 380 F. 2d 86 (C.A. 10); *Lockhart* v. *United States,* 420 F. 2d 1143 (C.A. 9).

In explicating the function of the judiciary in reviewing an administrative classification, this Court has admonished that "it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies." *Witmer* v. *United States,* 348 U.S. 375, 380–381; and see also *Dickinson* v. *United States,* 346 U.S. 389, 396. The scope of review is limited to a determination whether there exists a "basis in fact" for the assigned classification discoverable from the administrative record. *Estep* v. *United States,* 327 U.S. 114, 122; 50 U.S.C. App. (Supp. V) 460(b)(3). That standard of review is now generally recognized as "the narrowest known to the law." See, *e.g., Blalock* v. *United States,* 247 F. 2d 615 (C.A. 4); *United States* v. *Freeman,* 388 F. 2d 246, 248 (C.A. 7);

United States v. *Corliss,* 280 F. 2d 808, 810 (C.A. 2); *United States* v. *Sturgis,* 342 F. 2d 328, 331 (C.A. 3); *DeRemer* v. *United States,* 340 F. 2d 712, 715 (C.A. 8); *United States* v. *Leavy,* 422 F. 2d 1155, 1157 (C.A. 9).

It is, of course, well established that the burden is on the registrant seeking exemption as a conscientious objector to demonstrate his entitlement to the status. *Swaczyk* v. *United States,* 156 F. 2d 17 (C.A. 1), certiorari denied, 329 U.S. 726; *United States* v. *Brown,* 423 F. 2d 751, 754 (C.A. 3); *Olguin* v. *United States,* 392 F. 2d 329 (C.A. 10); see also *Dickinson* v. *United States,* 346 U.S. 389, 395. This does not mean that he must prove the "validity of what he believes" or "the truth of his concepts" (*United States* v. *Seeger,* 380 U.S. at 184), for that is a domain foreclosed from government inquiry. See *United States* v. *Ballard,* 322 U.S. 78, 86. But the nature and content of his professed beliefs are necessarily subject to scrutiny. This Court has long recognized "* * * that the Congress, by relating the registrant's conscientious objection to his religious training and belief, 'has made the belief of his sect relevant.'" *Sicurella* v. *United States,* 348 U.S. 385, 390. That is no less true today than it was thirty years ago in cases where the claim is premised on the tenets of a religious sect. See, *e.g., Negre* v. *Larsen, supra.*

We are entirely in accord with petitioner that the controlling question in any conscientious objector case is the religious beliefs of the individual registrant, and not necessarily the beliefs of the sect with which he claims affiliation. A member of a religion not tradi-

tionally considered to be pacifist in nature, for example, may well qualify as a conscientious objector because of his own—perhaps even erroneous—interpretation of the religious doctrine. See *United States* v. *St. Clair*, 293 F. Supp. 337 (E.D. N.Y.). Or conversely, as petitioner points out (Pet. Br. 23), "affiliation with a particular religious sect, even though it may be pacifist, does not automatically entitle one to conscientious objector status." Cf. *United States* v. *Simmons*, 213 F. 2d 901 (C.A. 7), reversed on other grounds, 348 U.S. 397.

But the instant case simply does not fit that analysis. Here, petitioner submitted to the Justice Department hearing officer, on his own volition, two books and a newspaper (*supra*, pp. 6-7) which were represented as setting forth the religious teachings that served as a basis for the objections he "expressed in his papers filed with the Draft Board" (App. 40a). In addition, he stated unequivocally that he placed reliance on the teachings of the Honorable Elijah Muhammad "solely and one thousand percent" (App. 100a). And, he even went so far as to state that if Elijah Muhammad " * * * looked at me and advised me, which I am sure he wouldn't, to fight in any kind of war, if he advised me to I would" (App. 101a, 102a). In these circumstances, we cannot agree (Pet. Br. 28) that the various writings submitted by petitioner and the teachings of Elijah Muhammad on which he placed such total reliance—in effect incorporating them by reference in his statement of beliefs (App. 80a)—have no relevance to the Department's

assessment of the nature and scope of his objections concerning war.

B. Turning to the Department's evaluation of the evidence before it, including petitioner's own statements, we think it is clear that both the Department and the State Appeal Board could permissibly conclude that petitioner did not establish that he was opposed to all war. While it is undeniably true that petitioner did suggest on several occasions that he was opposed to participation in any war (App. 10a, 13a, 18a, 98a), the record as a whole strongly indicates that the "wars" to which both petitioner and his religious leaders are opposed include only conflicts which are not being waged against the Muslims, rather than shooting wars in general.

Thus, Samuel X. Saxon, an Assistant Minister of the sect, who testified at the Justice Department hearing on the tenets of the Muslim faith, stated that the Muslims believe that "war is when you [*sic*] voluntarily fighting someone," and is to be distinguished from "self-defense" which is when "we are attacked or fight is forced on us" (App. 42a). Petitioner expressed the same view. Muslims are "not to participate in wars on the side of * * * nonbelievers" (App. 96a), he said. Following the teachings of the *Holy Qur'an*, as he interpreted them, the Muslims "are not to even as much as aid the infidels or the nonbelievers in Islam, even to as much as handing them a cup of water during battle" (App. 68a). Instead, he stated, they are taught only to "defend [them]selves when [they] are attacked"

(App. 79a–80a)." Accordingly, he reasoned, I have "no quarrel with the Viet Cong" (App. 18a); they "are not attacking me" (App. 80a). The country that is involved "is a Christian country * * * not a Muslim country" (App. 96a–97a). In these circumstances he asked: "Why should we Muslims get involved" (App. 80a).

This line of thought closely parallels the expressions of Elijah Muhammad, whose letter to the appeal board on behalf of petitioner stated (App. 177a):

> The law of Allah does not permit a Muslim to be an aggressor, fight only those who fight with Muslims, the law of Islam further discredits a Muslim as being a Muslim who will fight on the side of a non-Muslim, though he may be his near of kin, or wars of unbelievers or whether such wars are between disbelievers of Islam or against Islam (the Muslims), of any nation other than Islam, or to bear arms in the armed forces of any nation other than Islam or to perform any non-combatant service or work of any kind under the direction of the authorities acting under any conscription of law of war

[11] Petitioner thus stated: "So, by our teaching and by we believing in God, whose law is self-preservation, we are taught not to be the aggressor, but defend ourselves if attacked and a man cannot defend himself if he knows not how, and we are taught that not only America, but all countries, all civilized governments have armies and have guns around their shores, not necessarily to attack or to be the aggressor, but to defend America or our country or whatever it may be if we are attacked. So, we, the Muslims to keep in physical condition, we do learn how to defend ourselves if we are attacked * * * (App. 104a–105a).

or fighting others, the beliefs of the Lost Found Nation of Islam.

What emerges from these statements is not a clear conscientious objection to "participation in war in any form," as the statute requires. Rather, the record amply supports the inference that, circumstances permitting, petitioner would not object to fighting tomorrow with real weapons in a defensive war on behalf of the Muslims. See *Gillette* v. *United States*, *supra*, slip op. 2, 10. Indeed, that appears as a fundamental tenet of his sect. In the newspaper, "Muhammad Speaks," introduced by petitioner at the Department hearing, the views of the Muslims on participation in war were stated as follows (App. 120a, 185a):

> We Believe that we who declare ourselves to be righteous Muslims, should not participate in wars which take the lives of humans. We do not believe this nation should force us to take part in such wars, for *we have nothing to gain from it unless America agrees to give us the necessary territory wherein we may have something to fight for*. (Emphasis added.)

Petitioner's brief suggests that the "only thing that is clear about this statement is its absolute opposition to participation in wars which take human lives" (Pet. Br. 32), and that "[t]he rest of the passage is ambiguous" (*ibid.*). We submit, however, that upon reading the statement one could reasonably conclude that it is not ambiguous at all. Rather, the second sentence can be read as qualifying the first, explaining the circumstances under which the objection to war

would be less than absolute—an objection not extending to "war in any form."

The fact that one might consider remote the circumstances under which petitioner would fight does not lessen the significance of this factor. Neither *Sicurella* v. *United States,* 348 U.S. 385, nor *United States* v. *Owen,* 415 F. 2d 383 (C.A. 8), suggests that a willingness to engage in a potential defensive shooting war should be ignored. What is controlling is petitioner's present state of mind, whether he can in consonance with his conscience presently envision himself engaging in a real shooting war under certain circumstances. If so, his belief does not qualify as a conscientious objection "to participation in war in any form," within the meaning of the language of the exemption provision. The government is not required to assess the probability or likelihood that the war in which petitioner would participate might not soon occur. Plainly, a registrant who says he could in good conscience fight in a war declared by the United Nations (see *Gillette* v. *United States, supra,* slip op. 2) *is a selective objector. So too, then, is one who claims,* for example, that he can only fight in a defensive war on behalf of Germany, or Russia, or Israel, or the Muslims. This, of course, differs from the situation which *Owen* encompasses, where the registrant's present state of mind compelled him to oppose *all* conceivable wars, but did not foreclose the possibility that at some future date his beliefs in this regard might change (cf. *Gillette* v. *United States, supra,* slip op. 10). Nor is it the same as *Sicurella,* for there

the registrant's opposition to real shooting wars was total and it was only a hypothetical theocratic war—with "weapons * * * spiritual, not carnal"—in which he could envision himself participating (348 U.S. at 389). And the wars in which petitioner would fight are not limited to "defense against immediate acts of aggressive violence" toward himself his family or other persons in his community. *Gillette* v. *United States, supra,* slip op. p. 10.

We agree with petitioner that the Muslim view of the impending Battle of Armaggedon is not inconsistent with a total objection to war; that battle would be a theocratic one between the forces of good and evil, and would not involve the physical participation of individual Muslims (App. 38a, 105a–107a). See *Sicurella* v. *United States,* 348 U.S. 385. The record shows no suggestion that petitioner's willingness to prepare for the Battle of Armaggedon (App. 105a–107a) would disqualify him from conscientious objector status. Rather, the Department's concern was with other statements on the record suggesting petitioner's present willingness to engage in "real shooting wars" (348 U.S. at 391) in defense of the Muslims (App. 15a, 18a, 68a, 79a–80a, 101a, 105a). That these defensive wars would involve the use of carnal weapons seems implicit in petitioner's own statements. Thus, he leaves little doubt that if the Viet Cong were attacking his people, the Muslims would become involved in that war (*supra,* pp. 25–26).

Accordingly, there is, in our view, ample basis for the administrative finding that petitioner did not

have a conscientious scruple against participation in all wars, but only against certain wars depending upon particular circumstances. The record supports the conclusion that his scruples were largely directed against participation in wars on behalf of the United States. Petitioner himself stated that "we are not to participate in wars on the side of nobody who—on the side of nonbelievers, and this is a Christian country and this is not a Muslim country" (App. 96a–97a).

That this attitude, though religiously motivated, could be said specifically to "rest on grounds which primarily are political and racial" (App. 122a), is best reflected in the following testimony by petitioner at the Department hearing (App. 77a):

> * * * the onliest hate I know, as far as the teachings of the Honorable Elijah Muhammad is concerned, * * * is that we hate the way that we've been treated for four hundred years. We hate the way that our pregnant women are being kicked around the streets; we hate the way the innocent negroes have been shot and lynched and killed outright, but the killers are not—never been caught, we hate that we're the first fired and the last hired and we hate the way we have served so faithfully for the country in all wars and have spent three hundred and ten long years and enabling America to have fifty of the richest states on the planet and yet still we are subjected to treatment which cannibals and Africans are treated better.

These are the considerations, he stated, that have led the Muslims to "want to separate" (App. 78a),

"to want to go for ourselves and do for ourselves and get some of this earth that we can call our own * * *" (*ibid.*). Military assistance to the United States is thus forbidden (Pet. Br. 33). As petitioner declared, "* * * the outright, every day oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the *Holy Qur'an*, to even as much as aid in passing a cup of water to the—even a wounded" (App. 97a). See also *Sostre* v. *McGinnes*, 334 F. 2d 906 (C.A. 2), certiorari denied, 379 U.S. 892; and see quotations from the *Supreme Wisdom* containing the teachings of Elijah Muhammad, set forth at App. 223 n. 4.

When this reasoning is viewed in light of petitioner's expressed willingness to fight in defense of the Nation of Islam—in "an Islamic World War" (App. 68a)—it can readily be inferred that his objection is "selective" in nature. Even if, as petitioner's brief seems to argue, various statements in the record suggest an ambiguity as to the circumstances under which he would engage in war, such an ambiguity would not require the administrative findings to be set aside on judicial review. Under the principles established both by the pronouncements of this Court and by Congress (*supra*, pp. 22–23), "review within the Selective Service System [is to be] final in all cases where there [is] conflicting evidence or where two inferences [can] be drawn from the same testimony." *Witmer* v. *United States*, 348 U.S. 375, 383.

Nor is the government foreclosed from concluding that petitioner is a "selective" objector because various

precepts of his Muslim religion (Pet. Br. 30–31) might tend toward the opposite conclusion. Nothing this Court said in *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, forecloses the government from also considering that Muslims are taught "to defend themselves when [they] are attacked" (App. 79a–80a), to fight in a war if advised to do so by Elijah Muhammad (App. 101a), and to participate in a defensive war if given "the necessary territory wherein we may have something to fight for" (App. 120a). The weight which the Department ultimately placed on these latter teachings manifestly did not turn on its own interpretation of the religious doctrine; rather, it resulted from the agency's assessment of the nature and scope of petitioner's personal beliefs as he understood and interpreted the teachings of his sect. This Court has long recognized that to be a legitimate function of the Selective Service System when a registrant puts his religious views in issue, as petitioner has. *Sicurella* v. *United States*, 348 U.S. 385. And, the recent decision in *Gillette* v. *United States*, *supra*, implicitly reflects a continuing awareness that careful scrutiny as to the nature and content of a claimant's religious beliefs is not constitutionally impermissible.[15]

[15] Of course, a decision that the Selective Service System has a basis to conclude that petitioner was not opposed to all war does not preclude other adherents of the Muslim faith from demonstrating that their views meet the requirements of the Act. It is merely a recognition that on the record placed before the Selective Service System by petitioner, it could not be said that Selective Service could not legitimately have concluded that petitioner had failed to meet his burden.

C. Petitioner further objects to the discussion in the Department of Justice's advisory letter about the separate issue whether petitioner sincerely held the beliefs that he asserted in support of his conscientious objector claim. We do not here seek to support the denial of petitioner's claim on the ground of insincerity; our argument is rather that petitioner's objection, however sincere, did not have the requisite generality to qualify him for exemption.[16] We think a fair reading of the Department's recommendation shows that it had the same emphasis. Moreover, contrary to petitioner's characterization of the sincerity discussion in that recommendation, the Department did not assert a firm conclusion that petitioner was insincere but rather simply presented, for the appeal board's consideration, a number of factors pertinent to the matter of sincerity.[17] Thus, we submit, there is nothing in this aspect of the Department's communication that casts doubt on the propriety of petitioner's classification.

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[16] We note that neither the question on which this Court granted certiorari nor any other question in the petition raised any issue about the administrative consideration of petitioner's sincerity.

[17] Petitioner's brief does point to the Department's statement at one point that "[A] registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent. *Campbell* v. *United States*, 221 F. 2d 454; *United States* v. *Corliss*, 280 F. 2d 808, certiorari denied, 364 U.S. 884" (App. 127a). However, the suggestion that this "must have sounded to the lay appeal board like the citation of a rule of law that absolutely precluded

The matters referred to by the Department were clearly pertinent to the sincerity question. Tardiness in asserting a claim of conscientious objection has commonly been recognized as one factor to be considered. *Salamy* v. *United States,* 379 F. 2d 838 (C.A. 10); *Bishop* v. *United States,* 412 F. 2d 1064, 1068 (C.A. 9); *United States* v. *Broyles,* 423 F. 2d 1299 (C.A. 4); *United States* v. *Messinger,* 413 F. 2d 927 (C.A. 2), certiorari denied, 399 U.S. 927; *United States* v. *Geary,* 379 F. 2d 915 (C.A. 2), certiorari denied, 389 U.S. 959. And where, as here, the claim was first presented after receipt of a notice of acceptability for induction, there is, at the very least, "a rational inference that imminence of induction * * * led to [the] presentation" *United States* v. *Bornemann,* 424 F. 2d 1343, 1348 (C.A. 2).[18]

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petitioner from being classified as a conscientious objector * * *" (Pet. Br. 39) unreasonably isolates and overemphasizes the importance of the statement on the record. Indeed, if the statement conveyed the meaning that petitioner suggests—that as a matter of law petitioner's claim was deficient—one would question why the Department felt it significant even to suggest any other reasons for denial.

[18] Although petitioner's completed conscientious objector form 150 was not received by the local board until after he had been classified I–A, nevertheless, as petitioner correctly points out, the letter which first apprised the board that he was a conscientious objector "was written several days after petitioner had received the statement of his acceptability for induction and not, as the Justice Department and the court below asserted, after he had already been classified I–A" (Pet. Br. 40). Of course, this technical mistake of a few days has no bearing on the validity of the inference the government sought to develop. The inference of insincerity arises irrespective of whether it was a statement of acceptability or a I–A classification that brought the imminence of induction to the registrant's mind.

Similarly, it was pertinent for the Selective Service System to consider the fact that petitioner filed other deferment claims while he was seeking conscientious objector status; if all the facts warrant a conclusion that a registrant is "deferment shopping" in a concerted effort to avoid service, that may well be a factor in evaluating his sincerity. Here, on receipt of his notice of acceptability for induction, petitioner suddenly filed claims for occupational (II–A) and hardship (III–A) deferments at the same time he claimed conscientious objector status. Both deferment claims rested on facts which clearly could have (App. 9a–11a), and by law should have,[19] been presented to his local board much earlier; and both were based, at least in part, on the probability of substantial financial losses if petitioner was forced to abandon temporarily his professional boxing career (App. 9a–11a). In these circumstances, it seems to us not inappropriate for the Department to suggest to the appeal board that it consider the possibility that financial factors might also have entered into petitioner's motivation for filing the conscientious objector claim.

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[19] Since the regulations require that a registrant "be classified in the lowest class for which he is determined to be eligible * * *" (32 C.F.R. 1623.2), and Classes II–A and III–A are both "lower" than Class I–Y, petitioner was under a continuing duty while he held his I–Y classification to inform his local board of the facts which he felt would warrant a reclassification to II–A or III–A. 32 C.F.R. 1625.1(b).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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